Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1382

STANLEY SWITLIK and RICHARD SWITLIK,
Petitioners,

—*v.*—

THE HARDWICKE CORPORATION; HARDWICKE COMPANIES INCORPORATED; GREAT ADVENTURE, INC.; ACKERMAN-NEY ASSOCIATES; WARNER LEROY and HARDWICKE'S NEW JERSEY PRESERVES, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL PROVISIONS INVOLVED	3
First Amendment to the United States Constitution	3
Fourteenth Amendment to the United States Constitution	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT:	
A. The trial court's reliance on activities in which Richard Switlik engaged for the purpose of imposing tort liability violated petitioner Richard Switlik's First Amendment rights as guaranteed by the due process clause of the Fourteenth Amendment	15
B. The trial court's determination that Richard Switlik was jointly and severally liable with his father, Stanley Switlik, for fraud was so tainted by its view that activities protected by the First Amendment in which Richard Switlik engaged formed the basis for tort liability that all the judgments entered in the within matter must be deemed constitutionally defective	21

PAGE

C. The failure of the trial court to adequately fact-find and, particularly, to state the legal bases for its imposition of liability deprived petitioners Stanley and Richard Switlik of due process of law as guaranteed by the Fourteenth Amendment 22

CONCLUSION 24

APPENDIX:

A—Opinion of the Superior Court of New Jersey, Chancery Division, dated July 14, 1976 1a

B—Opinion of the Superior Court of New Jersey, Chancery Division, dated August 26, 1977 ..... 6a

C—Opinion of the Superior Court of New Jersey, Appellate Division 16a

D—Order of the Supreme Court of New Jersey, Denying Certification 20a

E—Corrected Order of the Supreme Court of New Jersey, Denying Motion for Reconsideration 22a

F—Order of the Supreme Court of the United States Granting Extension of Time to File Petition for Certiorari 23a

G—Order of the Supreme Court of New Jersey Filed January 18, 1980 Staying Judgment Pending Petitioners' Application for a Stay to the Supreme Court of the United States 24a

PAGE

H—Corrected Order of the Supreme Court of New Jersey Filed January 24, 1980 Extending Time for Filing Petitioners' Application for a Stay With the Supreme Court of the United States 26a

I—Consent Order Filed January 25, 1980 by the Supreme Court of New Jersey Further Extending Time for Filing Petitioners' Application for a Stay With the Supreme Court of the United States 28a

J—Letter from Supreme Court of the United States, Office of the Clerk, Informing Petitioners of Denial of Application for Stay of Judgment 30a

Cases Cited

Brown v. Glines, 48 U.S.L.W. 4095 (Decided Jan. 21, 1980) 18

Buckley v. Valeo, 424 U.S. 1 (1976) 18, 20

California Transport v. Trucking Unlimited, 404 U.S. 508 (1972) 18

Eastern R.R. Conference v. Noerr Motor Freight, 365 U.S. 127 (1961) 18

Edwards v. California, 362 U.S. 229 (1963) 18

Giglio v. United States, 405 U.S. 150 (1972) 21

Herbert v. Lando, —— U.S. ——, 99 S. Ct. ——, 60 L. Ed. 2d 115 (1979) 18, 19

In re Murchison, 349 U.S. 133 (1955) 24

In re Primus, 436 U.S. 412 (1978) 17, 18, 20

PAGE

Marchant v. Pennsylvania Railroad, 153 U.S. 380 (1894) 24

Mills v. Alabama, 384 U.S. 214 (1966) 17

Moore v. Illinois, 434 U.S. 220 (1977) 21

Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977) 22

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 17

United States v. Santana, 427 U.S. 38 (1976) 21

United Transportation Union v. Michigan Bar, 401 U.S. 576 (1971) 17, 18

United States Constitution Cited

First Amendment 3, 8, 17, 19-22

Fourteenth Amendment, Section 1 ..... 3, 13, 21, 22

Statute Cited

28 U.S.C. Sec. 1257(3) 3

Rule Cited

Rule 1:7-4 23

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Petitioners Stanley Switlik and Richard Switlik respectfully pray that a writ of certiorari issue to review the judgment of the Superior Court of New Jersey, Appellate Division, entered in the above entitled case on May 31, 1979.

Opinions Below

Petitioners request review of the decision of the Superior Court of New Jersey, Appellate Division, rendered on May 31, 1979 in an unreported opinion. The Appellate Division's opinion is submitted herewith as Appendix "C". The earlier decisions of the Superior Court of New Jersey, Chancery Division, dated July 14, 1976 and August 26, 1977, neither of which is officially reported, are submitted herewith as Appendix "A" and "B" respectively.

Jurisdiction

The judgment of the Superior Court of New Jersey, Appellate Division, was entered on May 31, 1979. A timely petition for certification was filed with the Supreme Court of New Jersey, which, on October 9, 1979, denied petitioners' application. A copy of the New Jersey Supreme Court's denial of certification is submitted herewith as Appendix "D". Petitioners thereafter moved for reconsideration of the denial of certification. In an order dated December 13, 1979, and again in a corrected order dated December 21, 1979, the Supreme Court of New Jersey denied petitioners' motion for reconsideration of the denial of certification. A copy of the New Jersey Supreme Court's corrected order of December 21, 1979 is submitted herewith as Appendix "E".

On December 28, 1979 petitioners filed an application with this Court for an extension of time in which to file their petition for a writ of certiorari. In an order dated December 31, 1979, petitioners' application to this Court was granted, the date for filing this petition being set forth therein as March 7, 1980. A copy of this Court's order dated December 31, 1979 is submitted herewith as Appendix "F".

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3) since the judgment of the Superior Court of New Jersey, Appellate Division, is challenged as repugnant to both the First and Fourteenth Amendments to the United States Constitution.

Questions Presented

1. Whether activities otherwise wholly protected by the First Amendment to the United States Constitution may be used by a state court as the basis upon which it imposes liability under the common law theories of tortious interference with both contract and prospective economic advantage.

2. Whether the decision below denies petitioners their rights to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

Constitutional Provisions Involved

First Amendment to the United States Constitution.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment to the United States Constitution.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

This case was tried in the Superior Court of New Jersey, Chancery Division, and consumed, over a four-year period, approximatley 65 trial days. It implicated questions of fraud and tortious interference with both contract and prospective economic advantage. Importantly, as a result of the trial court's opinions of July 14, 1976 and August 26, 1977, it also presented for consideration by the Appellate Division various federal constitutional questions which that court never directly addressed. In order to put those federal constitutional questions in perspective, a somewhat lengthy narrative is necessary.

Respondent-The Hardwicke Corporation ("Hardwicke") is a Delaware corporation engaged in, among other things, the development and operation of wild animal safari parks. In early 1972 Hardwicke was seeking to purchase property upon which to build a wild animal safari park in the Southern New Jersey area. Respondent became aware that certain portions of an estate owned by Stanley Switlik, an 89 year old immigrant, and his wife, Wanda Switlik (now deceased), in Jackson Township, New Jersey might be available for purchase. Hardwicke contacted a real estate agent for the purpose of negotiating a purchase of the properties.

Following several meetings in May 1972 among Stanley and Wanda Switlik, their counsel, and representatives of

respondent, on or about May 24, 1972, Stanley and Wanda Switlik entered into a contract with respondent to convey "820 acres more or less" of their estate for a total purchase price of $2,150,000. A clause governing the use of the premises provided that the land was to be used "primarily for a wild animal theme park and related uses." Hardwicke was obliged to "preserve the ecology aspect of the premises to the best of its ability."

Because of a plethora of ambiguities in the contract of sale, protracted negotiations occurred between the parties until June 22, 1973 when closing was finally effected.

On August 6, 1973, respondent applied for "conceptual" approval to the Jackson Township Planning Board for Phase II of its project, an amusement park. Hardwicke had no plans to open the amusement park contemporaneously with the safari park. Hardwicke rather sought "conceptual" approval of the amusement park so that it would be free to construct it as part of a subsequent phase of the park. Following a hearing on August 20, 1973, application for conceptual approval was denied. On September 24, 1973, following further discussions with the Planning Board, an environmental impact study was requested from Hardwicke.

In August 1973, the Switliks first became aware of the nature of the amusement park planned by Hardwicke as Phase II of the project through review of a site plan application. The Switliks became extremely concerned that the park, which had been projected by Hardwicke as primarily an animal park with some "related" entertainment facilities subordinate thereto, would in fact be the reverse —a "Coney Island" type amusement park with the animal park in a subordinate capacity.

Richard Switlik appeared at Planning Board meetings in the fall of 1973 and objected to "Phase II" of the pro-

ject, *i.e.*, the amusement park. Richard Switlik was extremely concerned about the adverse environmental impact which the amusement park would have on the immediate area, including those tracts of land owned by him which were contiguous to the property purchased by respondent. Neither Richard nor Stanley Switlik opposed the safari park in principle; rather, Richard Switlik expressed the position that the safari park should comply with applicable environmental regulations, as well as those covenants in the deed forbidding pollution and other damage to the land.

On September 10, 1973, a Complaint and Order to Show Cause was filed in New Jersey Superior Court, Chancery Division, Mercer County in the matter of *Jack L. Seelig* v. *The Hardwicke Corp., et al.* The action sought injunctive relief and damages for the closing by Hardwicke of public roads in the vicinity of lands held by Seelig as trustee for Richard Switlik and his children.

Richard Switlik first learned of the availability of the tract of land referred to as the Seelig tract on or about March 6, 1973, by unsolicited letter. The property seemed a good investment, and Richard Switlik wished to continue his father's practice of investing in land for the benefit of his children. In March or April 1973, Richard Switlik entered into a contract to purchase the land, and instructed Jack L. Seelig, Esq., that the purchase was to be in trust for the benefit of his children, each of whom had a 24% interest in the trust; Richard Switlik retaind a 4% interest. Following the June 22, 1973 closing, a written trust agreement was executed memoralizing the verbal agreement which was in force on the date of closing.

Access to the Seelig tract was provided by two public roads running through the property. In early September

1973, Richard Switlik's son, Gregory, discovered that respondent had chained off both access roads and had posted signs forbidding entrance, thereby cutting off access. Gregory Switlik, being one of the persons interested in the tract, contacted a local attorney for the purpose of instituting litigation to protect access. The litigation was eventually settled. Pursuant to the terms of the settlement, the entire Seelig tract was conveyed to respondent for $30,000, and the public roads, as a result, remained closed.

Throughout the period following closing, from time to time Richard Switlik communicated with government officials respecting Hardwicke's lack of compliance with applicable governmental regulations concerning, among other things, pollution and sewage control. The communications in general consisted of efforts by Richard Switlik both in his capacity as landowner and as agent of his father to bring to the attention of federal, state and local officials violations of regulations with which Hardwicke was bound to comply. The violations referred to in Richard Switlik's letters were significant, and were the subject of serious consideration by the agencies with which Richard Switlik communicated, as evidenced by the letters received by Richard Switlik in response to his communications. Indeed, Hardwicke was found to have violated the law with respect to certain of the activities which were the subject of Richard Switlik's letters. The letters were sent to protect Richard Switlik's investment in adjoining land and to protect his father's investment in the land which he had retained.

During the course of his contacts with government agencies, Richard Switlik was invited to a meeting of the Upper Freehold Environmental Commission, the purpose of which was to discuss the environmental impact of the

respondent's project upon the Township of Upper Freehold. Richard Switlik attended the meeting, brought with him certain materials requested by the Committee relevant to Hardwicke's project, and answered questions posed to him by the membership. Prior to Mr. Switlik's appearance, the Committee had voted to retain counsel to investigate the legal ramifications of the Hardwicke project.

Retention of counsel was followed by the filing of a lawsuit by the Environmental Commission against the Jackson Township Planning Board on or about February 8, 1974. Richard Switlik had no involvement whatsoever in the instigation of the Environmental Commission litigation, which was eventually terminated by the grant of summary judgment in favor of defendants on May 29, 1974. Richard Switlik, among others, was solicited for contributions by the Commission, and on behalf of his father contributed $6,000 to the Upper Freehold Environmental Commission. Richard Switlik made no contributions on his own behalf to the Upper Freehold Environmental Commission.

The foregoing generally describes the fact complex surrounding the First Amendment issues to be discussed hereafter. Before turning to a discussion of the trial court's view of these activities, a brief statement of the litigation commenced by petitioners is in order.

On or about September 28, 1973, Stanley Switlik filed a complaint in the Superior Court of New Jersey, Chancery Division, wherein he sought injunctive relief and damages against Hardwicke and others for the destruction of timber on lands owned by him. The trial court, on October 2, 1973, denied Stanley Switlik's application for a preliminary injunction and dissolved a temporary restraint which had been imposed against the cutting of trees. Following appeal on the same date to the Superior

Court of New Jersey, Appellate Division, an order was entered enjoining Hardwicke and others from destroying and/or removing trees and underbrush in a 24 acre area, pending a plenary hearing on the case to be held on or before October 16, 1973. On the day before trial on Stanley Switlik's complaint, a copy of respondents' responsive pleading was served. This pleading set forth respondents' answer and contained various affirmative defenses, as well as six counterclaims. Certain of the counterclaims were asserted against Stanley Switlik's son, Richard Switlik, who was referred to as an additional defendant on the counterclaim.

The counterclaims asserted by respondent consisted of the following:

1. The first counterclaim sought damages resulting from delay in opening the entertainment park occasioned by the preliminary injunction entered by the Superior Court of New Jersey, Appellate Division, on October 2, 1973, pending resolution of Stanley Switlik's claims.
2. The second counterclaim sought a judgment quieting title against Stanley and Wanda Switlik, as against claims by the Switliks that (a) title to the disputed 24 acre parcel was not conveyed to respondent, (b) a right of access existed along a preexisting public road extending south of their homestead, and (c) a piece of land known as Parcel 10C was owned by Stanley Switlik.
3. The third and fourth counterclaims sought damages for alleged wrongful failure to convey title from May 21, 1973 to June 21, 1973.
4. The fifth counterclaim sought damages from Richard Switlik for alleged interference with respondent's

contractual rights to acquire the property from Stanley and Wanda Switlik.

5. The sixth counterclaim sought damages from Richard Switlik for alleged interference with the prospective economic advantage of respondent.

In late November 1973, the Switliks filed answers to the various counterclaims and in turn asserted various counterclaims of their own. Following the trial, which occupied 19 trial days, the Honorable Mark Addison, Superior Court of New Jersey, Chancery Division, rendered his opinion. He specifically limited his ruling to three aspects of the litigation, finding as follows:

1. The parties had in fact never agreed on where the boundary line was to be in the vicinity of the disputed 24 acre parcel, nor what was going to be conveyed in the area in question;
2. Respondents were misled by petitioners in connection with the claim of ownership of Parcel 10C; and
3. The existing access road running northwesterly from Reed Road to the Switlik homestead was no longer available to the Switliks.

Judge Addison also found that Stanley Switlik's son Richard had been actively assisting his father as agent in all negotiations and ancillary matters in connection with the sale.

On or about February 2, 1976, by per curiam opinion, the Superior Court of New Jersey, Appellate Division, affirmed Judge Addison's decision, substantially for the reasons expressed in his letter opinion of December 20, 1973. The case was subsequently assigned to the Honorable Robert H. Doherty, Jr., for trial of the remaining issues in the counterclaims.

Following a 13 day trial on the remaining counterclaim issues, on July 14, 1976, Judge Doherty rendered his letter opinion finding Richard Switlik individually liable for tortious interference with respondent's contractual relations and tortious interference with respondent's prospective economic advantage, and finding Richard and Stanley Switlik jointly and severally liable for damages in connection with misrepresentations made with regard to Parcel 10C. On or about December 9, 1976, an order for judgment on liability only in favor of respondent was entered by Judge Doherty.

In his July 14, 1976 letter opinion, in part adjudging Richard Switlik liable for interference with respondent's prospective economic advantage, the trial judge stated as follows:

I find the following facts:

Richard Switlik participated in a fraud against Hardwicke as will be referred to hereinafter. He made numerous complaints by letter and otherwise to official and unofficial bodies concerning Hardwicke's activities both before and after the title to the property was conveyed. He persisted in claiming that his father had an access through the original access road even after the settlement of this claim. He purchased the "Seelig Property" for at least the partial purpose of being in a position, as a neighbor, to make complaints through an alleged trustee. The complaints reinforced his own complaints against Hardwicke. He did not disclose his interest in this property. He participated in the financing of a lawsuit by the Environmental Commission of Upper Freehold, et al, by furnishing at least some of his money to the plaintiffs for legal expenses. He caused twenty (20) tons of sand to be

dumped in a drainage area to the disadvantage of Hardwicke. He appeared before the Planning Board and spoke out in opposition to the location of an entertainment park on the Hardwicke property although he had participated in the settlement leading to the title closing. He knew that this settlement specifically contemplated such a park. The above activities interfered with and were detrimental to Hardwicke's economic position.

I conclude that many of the above activities taken separately would not be wrongful. Taken together they satisfy me of Richard Switlik's malicious motivations in undertaking them. I find therefore that Richard Switlik is liable to Hardwicke on this theory.

On January 11, 1977, the trial on damages in connection with the counterclaims commenced. Following a 30 day trial, on August 26, 1977, the trial court issued a letter opinion awarding compensatory damages against Richard and Stanley Switlik, jointly and severally, in the sum of $4,910,423, together with interests and costs, for fraud, and against Richard Switlik, individually, in the sum of $1,432,-449, plus interest and costs, for tortious interference with both contract and prospective economic advantage.

Petitioners appealed these judgments to the Superior Court of New Jersey, Appellate Division, raising numerous assertions of error, among them (a) that the trial court erred in ruling that activities of Richard Switlik that are protected by the First Amendment to the United States Constitution gave rise to liability for tortious interference; and (b) that the trial court's determinations, not having been based upon adequate fact-finding and thoroughly devoid of citation to or discussion of controlling

New Jersey law, deprived them of a fair trial, thereby constituting a denial of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

On May 31, 1979, the Appellate Division affirmed the trial court's determinations in a per curiam opinion. That court did not directly address petitioners' constitutional arguments but merely said:

> * * * [T]he judgments of the trial court is [sic] based on findings of fact which are adequately supported by the evidence; the determination of the trial court on the motion for a new trial does not constitute a manifest denial of justice, and * * * all issues of law raised are clearly without merit. * * *.

On October 9, 1979, the Supreme Court of New Jersey, without opinion, denied petitioners' timely petition for certification. In an order dated December 13, 1979, and again in a corrected order dated December 21, 1979, the Supreme Court of New Jersey denied petitioners' motion for reconsideration of the denial of certification.

On December 28, 1979, petitioners filed an application wtih this Court for an extension of time in which to file a petition for a writ of certiorari. Contemporaneous therewith, petitioners filed a motion for stay of judgment with the New Jersey Supreme Court.

In an order dated December 31, 1979, petitioners' application to this Court for an extension of time to file a petition for writ of certiorari was granted. In an order filed January 18, 1980, the New Jersey Supreme Court granted petitioners' motion for a stay of judgment "until February 11, 1980, provided that the [petitioners] make

application to the Supreme Court of the United States for a stay pending petition for a writ of certiorari on or before January 25, 1980 * * *." A corrected order, filed by the New Jersey Supreme Court January 24, 1980, extended the time within which petitioners might make application to this Court until January 28, 1980; a consent order, filed by the New Jersey Supreme Court on January 25, 1980, further extended this time until February 4, 1980. Copies of the New Jersey Supreme Court's orders relating to petitioners' stay application are submitted herewith as Appendix "G," "H," and "I" respectively.

By letter dated February 5, 1980, the Clerk of this Court informed petitioners that their application for stay of judgment was presented to Mr. Justice Brennan who, on February 5, 1980 (submitted herewith as Appendix "J"), endorsed thereon the following:

"Denied
Wm. J. Brennan, Jr.
2/5/80"

Reasons for Granting the Writ

A. The trial court's reliance on activities in which Richard Switlik engaged for the purpose of imposing tort liability violated petitioner Richard Switlik's First Amendment rights as guaranteed by the due process clause of the Fourteenth Amendment.*

In reaching the determination that Richard Switlik was liable for tortious interference with respondent's prospective economic advantage, the trial judge relied on seven discrete activities engaged in by Richard Switlik: (1) allegedly participating in a fraud against respondent; (2) lodging of numerous complaints by letter to official governmental bodies concerning respondent's activities; (3) persisting in claiming that his father had access to property through a particular access road; (4) purchasing the "Seelig property" for the alleged purpose of making complaints in connection therewith through his trustee; (5) participating in the financing of a lawsuit by the Environmental Commission of Upper Freehold; (6) allegedly causing twenty tons of sand to be dumped in a drainage area to the disadvantage of respondent; and (7) appearing before the Jackson Township Planning Board and speaking out in opposition to the location of respondent's entertainment park.

Although individually enumerating each of the foregoing activities, the trial judge determined that only the

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* Although petitioners seek review of the judgment of the Superior Court of New Jersey, Appellate Division, the ensuing legal discussion necessarily focuses on the trial court's determinations since only the trial court explicitly discussed the issues involved herein, the Appellate Division thereafter in general terms affirming the lower court's judgments.

cumulative effect of these activities was sufficient to impose liability on Richard Switlik. Indeed, the trial judge commented in his July 14, 1976 letter opinion: "I conclude that many of the above activities taken separately would not be wrongful."

We submit that four of the seven activities relied on by the trial court in construing the common law of New Jersey respecting tortious interference with prospective economic advantage are fully clothed with First Amendment protection, namely, those activities heretofore denominated (2), (4), (5) and (7). Since each of these activities was used by the trial judge in finding liability, we submit that the entire judgment entered against Richard Switlik ultimately must be reversed.*

That Richard Switlik's lodging complaints with various governmental agencies relative to respondent's activities, his contribution to funding a lawsuit instituted to protect the environment, his purchase of property, a portion

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* Although respondent has asserted in its brief to the Appellate Division (at p. 76) that "[d]amages of $89,140 were awarded against Richard Switlik for malicious interference with the prospective economic advantage of [respondent]," the trial court's letter opinion assessing damages against both petitioners, dated August 26, 1977, does not explicitly state the legal theory of liability pursuant to which the aggregate judgment against Richard Switlik was entered. Consequently, were this Court to grant certiorari and later hold that the trial court's reliance on certain activities in which Richard Switlik engaged was constitutionally defective, we believe the entire judgment against Richard Switlik would require vacation. Moreover, as discussed at B., *post* at 21-22, the trial court's conclusion that activities engaged in by Richard Switlik constituted malicious interference—activities which we maintain are protected by the First Amendment—may have so infected the entire proceeding below that the aggregate judgment against *both* petitioners requires reversal.

of which was held in trust for his benefit, which subsequently formed the basis of a lawsuit commenced by his son to protect said property, and his appearances before the Jackson Township Planning Board for the purpose of voicing opposition to respondent's planned development of an entertainment park—that all these are activities protected by the First Amendment is evident from a reading of this Court's decisions respecting the sanctity of free speech guarantees. As was the case with *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), we believe that the within matter should be considered "* * * against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open * * *." *Id.* at 270. "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills* v. *Alabama,* 384 U.S. 214, 218 (1966).

We begin with the proposition that the trial court's interpretation of the common law of New Jersey respecting the theory of tortious interference with prospective economic advantage constitutes state action sufficient for petitioners to claim the protection of their First Amendment guarantees. See *New York Times Co.* v. *Sullivan,* 376 U.S. at 265.

Regarding the so called "Seelig litigation" and Richard Switlik's contribution to financing a lawsuit instituted by the Environmental Commission of Upper Freehold, we note that this Court has affirmed the principle that "'collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.'" *In re Primus,* 436 U.S. 412, 426 (1978), quoting from *United Transportation Union*

v. *Michigan Bar,* 401 U.S. 576, 585 (1971). See also *California Transport* v. *Trucking Unlimited,* 404 U.S. 508, 510 (1972); *Brown* v. *Glines,* 48 U.S.L.W. 4095, 4099-4100 (Decided Jan. 21, 1980) (Brennan, J. dissenting). Moreover, the right to associate with others in the expression of opinion—even where such association is accompanied by financial contribution—is not open to question. See *Buckley* v. *Valeo,* 424 U.S. 1, 15 (1976). We submit that the trial court's reliance on Richard Switlik's participation in these lawsuits for the purpose of imposing tort liability directly contravened this Court's decisions respecting access to the courts and the right to petition one's government.*

Next, regarding Richard Switlik's lodging complaints by letter to various governmental agencies, and his appearances before the Jackson Township Planning Board, we believe the inviolability of these rights is too settled by decisions of this Court to require extensive discussion. See *e.g., Edwards* v. *California,* 372 U.S. 229, 235 (1963); see generally *Herbert* v. *Lando,* —— U.S. ——, —— nn. 1, 2 & 3 (1979) (Brennan, J., dissenting in part). Where the interpretation of a state's common law results in

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* We believe that the opinion of Justice Black for an unanimous Court in *Eastern R.R. Conference* v. *Noerr Motor Freight,* 365 U.S. 127 (1961), although ostensibly not considering First Amendment issues, see *id.* at 132 n.6, dispells any notion that Richard Switlik's motive in petitioning his government, or even the alleged "third-party technique" employed in the Seelig litigation, is sufficient to deprive him of constitutionally protected rights. Furthermore, the interest that both petitioners had in the environmental integrity of their property and, indeed, surrounding properties—an interest evidenced long before their dealings with respondent— belies any idea that Richard Switlik's attempts to force respondent to comply with applicable environmental regulations was a "sham." See *In Re Primus,* 436 U.S. at 428 n.20.

activities such as the foregoing being deemed evidence of an element of tortious activity—indeed, being deemed the tortious activity itself—this Court's intervention becomes a necessity.

The effect of the decisions below naturally is not limited to depriving Richard Switlik of his First Amendment guarantees. If the decision of the trial judge is permitted to stand, citizens of New Jersey who (a) legitimately complain to governmental bodies; (b) file *bona fide* lawsuits in order to protect the surrounding environment; or (c) voice opposition to community projects in the very forum designed to air such grievances, will necessarily run the risk that their conduct may result in civil liability for tortious interference with another's prospective economic advantage. Their only alternative to assuming such a risk will be to unduly circumscribe their activities, leading to the erosion of the "robust and wide-open" public debate this Court has heretofore sought to protect by its First Amendment jurisprudence.

The citizens of New Jersey have at stake in the within matter no less than petitioner Richard Switlik. For if the decision of the trial judge respecting petitioner Richard Switlik's First Amendment rights remains undisturbed, and if on the basis thereof private citizens refrain from voicing their opinions on matters of public importance because of the fear of civil liability, the public at large is deprived of the fullest exposition of ideas possible relative to a given issue. The predictability of this result is perhaps most eloquently alluded to by Professor Meiklejohn, quoted in *Herbert* v. *Lando,* —— U.S. at ——n.3 (Brennan, J., dissenting in part):

> "'Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or

criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.* The principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.' A. Meiklejohn, Political Freedom: The Constitutional Powers of the People 22 (1965) [Emphasis in the original]."

We submit that the within matter implicates the very "thinking process of the [New Jersey] community," and that this Court, in order to prevent the "mutilation" thereof, should ultimately reverse the trial judge's reliance on activities engaged in by Richard Switlik, fully protected by the First Amendment, for the purpose of imposing tort liability. The interpretation by the trial court of New Jersey's common law respecting tortious interference with prospective economic advantage cannot "withstand the 'exacting scrutiny applicable to limitations on core First Amendment rights. . . .'" *In re Primus,* 436 U.S. at 432, quoting from *Buckley* v. *Valeo,* 424 U.S. at 44-45 (1976).*

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* The trial court's legal conclusion on the issue of tortious interference with prospective economic advantage, being absolutely essential to its finding of liability, and being thereafter affirmed by the Appellate Division, appears now to be the law of New Jersey by which other trial courts are bound. To the extent, however, if any, that the opinion of the Appellate Division, not having been

(Footnote continued on following page)

B. The trial court's determination that Richard Switlik was jointly and severally liable with his father, Stanley Switlik, for fraud was so tainted by its view that activities protected by the First Amendment in which Richard Switlik engaged formed the basis for tort liability that all the judgments entered in the within matter must be deemed constitutionally defective.

In the trial judge's July 14, 1976 letter opinion, three independent bases of liability were discussed, namely, interference with respondent's contractual relations, interference with respondents' prospective economic advantage, and fraud. As discussed hereinbefore, in this very same letter opinion the trial court relied on activities in which petitioner Richard Switlik engaged that are protected by the First and Fourteenth Amendments for the purpose of determining that petitioner Richard Switlik was liable for interference with respondent's prospective economic advantage. At the very outset of enumerating the activities in which petitioner Richard Switlik engaged, the trial judge stated that "Richard Switlik participated in a fraud against Hardwicke as will be referred to hereinafter," thereafter reciting the activities discussed hereinbefore.

Since it is impossible to discern whether the trial court, in determining that Richard Switlik and Stanley Switlik were jointly and severally liable for fraud, was influenced

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(Footnote continued from preceding page)

published in the official reports, is deprived of some precedential value, we submit that the constitutional questions presented herein are sufficiently weighty for this Court to review, just as it has reviewed other significant cases where a trial court's determination has been affirmed either without opinion or in an unpublished opinion. *See, e.g., Moore* v. *Illinois,* 434 U.S. 220 (1977); *United States* v. *Santana,* 427 U.S. 38 (1976); *Giglio* v. *United States,* 405 U.S. 150 (1972).

by its conclusion that activities protected by the First Amendment may be used for the purpose of ascertaining motive, we submit that all the judgments against petitioners must be deemed constitutionally defective and, therefore, ultimately reversed. This is particularly true since the trial court, in imposing liability for tortious interference, impliedly found that Richard Switlik was acting in an individual capacity whereas, in imposing liability for fraud, inconsistently found that Richard and Stanley Switlik acted jointly and severally. Petitioners should be afforded the opportunity to litigate the within matters free from the taint of a legal conclusion that activities engaged in by either one of them which are protected by the First and Fourteenth Amendments may be used to determine their motive in connection with allegedly tortious activities.*

C. The failure of the trial court to adequately fact-find and, particularly, to state the legal bases for its imposition of liability deprived petitioners Stanley and Richard Switlik of due process of law as guaranteed by the Fourteenth Amendment.

The trial court issued two letter opinions in this case, dated July 14, 1976 and August 26, 1977. In the first opinion letter it set forth in wholly conclusory terms the legal

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* Because the trial court never indicated that imposing liability for interference with prospective economic advantage would have resulted even absent reliance on the activities in which Richard Switlik engaged that are protected by the First Amendment, we believe that at a minimum a remand to the trial court would prove necessary were this Court to grant certiorari and hold that First Amendment violations had occurred. *See, Mt. Healthy City School Dist.* v. *Doyle,* 429 U.S. 274, 285-87 (1977).

bases for establishing liability against the Switliks. Despite approximately fifteen days of testimony and extensive briefs by both parties, the trial judge failed to cite a single case or any other authority in this opinion and did not refer to one exhibit or one page of testimony transcript. The full opinion is less than four pages in length. In the second opinion letter he awarded a total of approximately $6,000,000 in damages to respondent, again without the benefit of a single legal citation. He had received approximately thirty days of testimony on damages and issued an opinion of less than six pages.

Rule 1:7-4 of the New Jersey Rules of Court provides in applicable part:

> In civil actions tried without a jury the court shall, in an opinion or memorandum decision, either written or oral, find the facts and state its conclusions of law thereon. * * * Upon motion made not later than ten days after entry of judgment, the court may amend or add to its findings and may amend the judgment accordingly, but the failure of the party to make such motion or to object to the findings shall not preclude his right thereafter to question the sufficiency of the evidence to support the findings. The motion to amend findings may be made with the motion for a new trial.

Although not so stated in any reported New Jersey case, the mandate of R. 1:7-4 is but a recognition of the minimum requirements of due process of law. Based upon the paucity of factual discussion in the trial court's letter opinions and the total absence of citation to controlling New Jersey precedent for the purpose of buttressing the trial court's legal conclusions, the Switliks were subjected to an arbitrary and capricious exercise of judicial power such that the very essence of due process—"[a] fair trial

in a fair tribunal * * * [*In re Murchison,* 349 U.S. 133, 136 (1955)]"—was ignored. Whether petitioners "rights were measured . . . by laws made to effect [them] individually [or] . . . by general provisions of law applicable to all those in like condition [*Marchant* v. *Pennsylvania Railroad,* 153 U.S. 380, 386 (1894)]" is impossible to ascertain. In such circumstances, it cannot be said that the proceedings in the trial court "were 'in due process.'" *Id.*

A corollary of the trial court's deprivation of petitioners' due process guarantees is that petitioners were relegated to a position where, without the benefit of the trial court's legal reasoning, they were unable to effectively present the merits of their case to the Superior Court of New Jersey, Appellate Division.

The deprivation of petitioners' due process guarantees caused by the trial court's failure to adhere to minimum standards of due process of law pervaded the entire proceeding below such that all the judgments rendered against petitioners are subject to constitutional attack.

CONCLUSION

For the reasons stated, the Petition for Certiorari should be granted.

Respectfully submitted,

WILLIAM B. MCGUIRE
Counsel for Petitioners, Stanley and Richard Switlik.

March 3, 1980

APPENDIX A

Opinion of the Superior Court of New Jersey, Chancery Division, dated July 14, 1976

OCEAN COUNTY COURT

Chambers of
ROBERT H. DOHERTY, JR.
Judge

Court House
Toms River, New Jersey
08753

July 14, 1976

LETTER OPINION

E. John Wherry, Jr., Esq.
340 West State Street
Trenton, New Jersey 08618

Frederick Becker, Esq.
Wilentz, Goldman and Spitzer
252 Madison Avenue
Perth Amboy, New Jersey 08861

Re: Stanley Switlik and Wanda Switlik vs. The Hardwicke Corporation, et al—Hardwicke Companies Incorporated, et al vs. Richard Switlik

Docket No. C-371-73

Gentlemen:

This letter opinion will concern itself with the liability of Richard Switlik to Hardwicke Companies, Inc. and

Appendix A

others hereinafter referred to as Hardwicke on three (3) separate theories and the liability of Stanley Switlik to Hardwicke on one (1) theory. These theories are as follows:

1. Interference with Hardwicke's Contractual Relations
2. Interference with Prospective Economic Advantage of Hardwicke
3. Fraudulent Conduct—This theory is the single theory against Stanley Switlik.

INTERFERENCE WITH HARDWICKE'S CONTRACTUAL RELATIONS

I find the following facts:

Richard Switlik advised Hardwicke that title would not close in accordance with the contract unless a certain boundary line was relocated. At this time he believed there was no ambiguity in the contract as to the location of this line between the property conveyed and that reserved by his parents. He did not consult with his parents prior to this action.

I find that he prevailed upon and encouraged Scott Bailey, an officer of the Girl Scout Council which owned land adjoining the premises in question, to oppose a necessary zoning variance before the Jackson Township Board of Adjustment. His purpose was to assure objection and yet not do so openly, since his father was bound by the contract in question to cooperate in obtaining the variance.

Richard Switlik further insisted that title would not close unless Parcel B of the premises to be conveyed contained a restriction against permitting wild animals thereon. There was no such restriction in the contract.

Appendix A

He further insisted on a specific location for an access road at or near the existing access road although the location of this road was to be negotiated. The clear intention of the parties was to locate the road at a place other than the existing access road. This road was clearly delineated on the map attached to the contract and its location would not ordinarily have to be negotiated.

He further insisted that the conveyance omit the neck of Switlik Lake although its conveyance was contemplated by the parties. This is evidenced by the addition of $100,000 to the contract price before the contract was signed. Judge Addison found, at the eariler trial of a different aspect of this case, that there was no common understanding with respect to the location of the boundary line.

Richard Switlik's above referred to understanding that there was no ambiguity remains important in determining his frame of mind in insisting on the changes in the contract. I find that these demands resulted in many concessions by Hardwicke in order to accomplish the settlement of the specific performance action. This settlement was forced upon Hardwicke by the elements of economic duress outlined in the testimony by Hardwicke officers.

I conclude that the above activities of Richard Switlik interfered with the Hardwicke contract and were wrongful, without justification, and amounted to legal malice. These acts were intentionally detrimental to Hardwicke and potentially beneficial to Richard Switlik, the only son of the vendors. Under this theory Richard Switlik is liable to Hardwicke.

Appendix A

INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE OF HARDWICKE

I find the following facts:

Richard Switlik participated in a fraud against Hardwicke as will be referred to hereinafter. He made numerous complaints by letter and otherwise to official and unofficial bodies concerning Hardwicke's activities both before and after the title to the property was conveyed. He persisted in claiming that his father had access through the original access road even after the settlement of this claim. He purchased the "Seelig Property" for at least the partial purpose of being in a position, as a neighbor, to make complaints through an alleged trustee. The complaints reinforced his own complaints against Hardwicke. He did not disclose his interest in this property. He participated in the financing of a law suit by the Environmental Commission of Upper Freehold, et al., by furnishing at least some of his money to the plaintiffs for legal expenses. He caused twenty (20) tons of sand to be dumped in a drainage area to the disadvantage of Hardwicke. He appeared before the Planning Board and spoke out in opposition to the location of an Entertainment Park on the Hardwicke property although he had participated in the settlement leading to the title closing. He knew that this settlement specifically contemplated such a park. The above activities interfered with and were detrimental to Hardwicke's economic position.

I conclude that many of the above activities taken separately would not be wrongful. Taken together they satisfy me of Richard Switlik's malicious motivations in undertaking them. I find therefore that Richard Switlik is liable to Hardwicke on this theory.

Appendix A

FRAUD

Judge Addison found plaintiffs guilty of fraud and Richard Switlik contends that it is not clear which of the plaintiffs were included in this finding. I find that Richard Switlik knew that Parcel 10C belonged to his father at the time the contract was being negotiated. He attempted to get the boundary line in question moved to connect with Parcel 10C. He joined with his father in misrepresenting the ownership of this parcel to be in the State of New Jersey. This was to the disadvantage of Hardwicke and prospectively to his advantage.

I conclude that Richard Switlik precipitated a fraud against Hardwicke and is liable therefor. Stanley Switlik has been found to be so liable by Judge Addison and I conclude from my own evaluation of the testimony that he is liable.

An Order may be presented in accordance with this opinion.

Very truly yours,

ROBERT H. DOHERTY, JR.,
J.C.C. t/a

RHDjr/abw/m

APPENDIX B

Opinion of the Superior Court of New Jersey, Chancery Division, dated August 26, 1977

OCEAN COUNTY COURT

CHAMBERS OF
ROBERT H. DOHERTY, JR.
JUDGE

COURT HOUSE
TOMS RIVER, NEW JERSEY
08753

August 26th, 1977

E. John Wherry, Jr., Esq.
340 West State Street
Trenton, New Jersey 08618

Frederick Becker, Esq.
Wilentz, Goldman and Spitzer
252 Madison Avenue
Perth Amboy, New Jersey 08861

Re: *Stanley Switlik and Wanda Switlik* v. *The Hardwicke Corporation et al Hardwicke Companies, Incorporated* v. *Richard Switlik*

DOCKET No. C-371-73

Gentlemen:

On July 14, 1976, this Court found that Stanley Switlik and Richard Switlik must respond in damages to Hardwicke's New Jersey Preserves, Inc. ("Preserves"), Hardwicke Companies Incorporated ("Hardwicke"), and Great

Appendix B

Adventure, Inc. ("Great Adventure"), together referred to as the Hardwicke interests. (See my Letter Opinion of that date) Since these findings included a finding that the Switliks had participated in a fraud and that Richard Switlik had acted maliciously, a further hearing was had to determine not only the amount of compensatory damages which should be awarded, but what exemplary or punitive damages are appropriate. This Letter Opinion concerns itself with the above referred to damage questions.

I shall first analyze the claims, then set forth my findings and finally award damages.

CLAIMS

1. Preserves claims compensatory and punitive damages against Richard Switlik for malicious interference with Preserves contractual relations with his parents, Stanley Switlik and Wanda Switlik, alleging that it was forced to renegotiate this enforceable contract for the sale of real estate because of economic pressure. This caused the loss of the use of large portions of the premises to be conveyed and the payment of an additional $100,000 in the purchase price. Preserves additionally seeks reimbursement for other expenses, including legal fees, which it alleges were incurred and will be incurred as a result of Richard Switlik's malicious interference with Preserves prospective economic advantage. It also seeks punitive damages in this connection.

2. Great Adventure seeks compensatory and punitive damages against Richard Switlik arising out of a delay in the closing of the above referred to real estate con-

tract, which delay arose out of the malicious interference of Richard Switlik. Great Adventure also seeks compensatory and punitive damages against Richard Switlik and Stanley Switlik arising out of a later and distinctly different delay brought about by the Switlik's fraudulent claim of ownership of a parcel of land which would effectively cut the premises in question approximately in two. Considerable testimony was heard concerning the effect of these delays in increasing the construction costs of the entertainment park and the loss of revenue arising out of the delayed opening of the park.

3. Hardwicke claims compensatory and punitive damages against both Richard Switlik and Stanley Switlik alleging that their malicious interference with its prospective economic expectancy resulted in a forced sale of its subsidiaries for an amount considerably under the fair value of these subsidiaries.

Facts and Conclusions

The Court finds the following facts and legal conclusions with respect to these claims:

Preserves was forced to close title under another agreement because it was economically necessary to commence work and have the amusement park open at the earliest possible time. The malicious interference of Richard Switlik with the contractual rights of Preserves and his interference with its prospective economic expectancy forced Preserves to abandon many of its rights under its May 1972 contract to purchase the site of the amusement park and to concede the loss of the use of a considerable portion of the land to be conveyed thereunder and further to pay additional money for rights which they already had under the contract. This interference also occasioned extra legal expenses to defend suits intended and fostered by Richard Switlik to delay Preserves.

I further find that the Hardwicke interests had planned at or about the time they entered the May 1972 contract, to construct both a Safari Park and Theme Park as part of an amusement park to be open for the Spring season of 1974. This would have been accomplished but for the malicious interference of Richard Switlik in wrongfully delaying the title closing from at least May 21, 1973 to late July, 1973, combined with the Parcel 10-C fraud of both Switliks. The Switliks knew that this delay would inflict great hardship and severe financial strain on the Hardwicke interests which in fact it did. I do not believe that the Theme Park was to be constructed for a later season and find that the contract for that Park was to begin by October 1973 when the heavy construction in the Safari Park was under way. It follows therefore that the expenses and losses occasioned by the delays are an appropriate part of any damage awarded to Great Adventure, as is the loss of the economic advantages to which Preserves were entitled under the contract of May 1972, which advantages they were forced to abandon by the tactics which delayed the closing under that contract.

As noted above, I found that there was a second delay occasioned by the fraudulent assertion of ownership of Parcel 10-C by Stanley Switlik and participated in by Richard Switlik. This delay was calculated to and did impose further burdens on the Hardwicke interests.

As to the Hardwicke's claim for damages arising out of the sale of its subsidiaries to New Adventure, Inc.,

the Court has considered the testimony of Mr. Thompson and Mr. Whitman as well as that of Mr. Perkins. In considering the projections and opinions of Mr. Whitman, it should be noted that although he places the construction cost increase occasioned by the second delay at $13,968,000, I have not accepted this figure as will be discussed later in this letter. It is agreed that the sale took place at a time when the economy in general was depressed and spending money for leisure time was restricted as was motor fuel availability. The Court is not persuaded by the greater weight of the credible evidence that the sale was in fact forced or that it was for less than fair market value. The Court therefore can make no award for damages based on this claim.

Compensatory Damages

I shall now proceed to assess such damages as I find are the natural and proximate consequences of the acts of the respective Switliks. I do not find it necessary to apply a more liberal rule in determining the consequences for which malicious tortfeasors are responsible, and I have not done so in assessing compensatory damages here.

1. As to Preserve's claims against Richard Switlik for the loss of the benefits it had under the land purchase contract, I award $100,000 for the loss of the lake area which I find from the testimony and exhibits should have been conveyed under the May 1972 contract; $407,303 for the loss of the use of the 155 acre tract which is arrived at by estimating the taxes and interest for the ten year period during which its use will be lost and $28,300 for the paving of the access way. I am not satisfied by the greater weight of the evidence as to what the loss might

be, if any, in connection with the claim for the cost of an overpass or the cutback of the Safari road or the additional engineering and surveying expenses referred to by Preserve's and I therefore make no award for those claims. In addition to the above, Preserve's was subjected to legal costs in connection with the delayed closings, forced settlement negotiations and the necessity for a specific performance suit in the amount of $65,500. I also awarded $16,244 in legal expenses for defending the Seelig suit which was precipitated wrongfully by Richard Switlik. Preserve's claims an additional $238,000 for legal fees in connection with the trial of the first aspect of this suit before Judge Addison, which legal fees I decline to consider since they were incurred in the same action in which this is the judgment. Therefore, I award Preserve's $617,347 in compensatory damages against Richard Switlik.

2. As to Great Adventure's claim against Richard Switlik arising out of the first delay, I find the following damages would have occurred even if there had been no second delay and will make an award accordingly: $28,791 for increased costs of roadway, $7,557 for maintaining incomplete roadways during winter, $364,937 additional expenses for animal structures after giving credit of $214,813 projected expenses for Umbaugh housing, and $1,605 costs of temporary zebra housing. These figures were testified to by Mr. Lapins and Mr. Nielsen, which testimony I found to be creditable and persuasive. I further find that the costs of defending the environmental suit should be assessed against Richard Switlik in the amount of $72,896, since Richard Switlik wrongfully participated in the financing of this lawsuit. Therefore, I find in favor of Great Adventure and against Richard Switlik on this claim in the amount of $475,786 as compensatory damages.

Appendix B

3. (a) As to the claim of Great Adventure against Richard Switlik and Stanley Switlik arising out of the second delay caused by the fraud with respect to Parcel 10-C, I find the following specific items of damage were suffered by Great Adventure and will enter judgment accordingly: Road costs in the Safari Park were increased by $53,387. It became necessary to rent generators at the cost of $17,860 for heat for animals in Safari Park. Both these figures were furnished by Mr. Lapins. Additional costs were incurred in connection with the completion of the Theme Park. Mr. Neilsen's testimony concerning this claim was quite lengthy and in great part esoteric, containing graphs constructed through the efforts of many engineers, interpretations, extrapolations, projections and references to skewed bell curves. Although this testimony was presented painstakingly and in great detail and although I am satisfied that damage was caused by the delay with its ensuing compressed work schedule, I am not persuaded by it and cannot accept Mr. Nielsen's conclusions and award specific damages based thereon. I was however, impressed by a good deal of Mr. Lapin's testimony with respect to specific instances of damages and shall make awards on this claim based on this testimony as buttressed and supplemented by the testimony of Messrs. Nielsen and Ney and other witnesses. Accordingly, I award $40,000 for the extra costs of the bandstand, $50,206 for extra concrete because of inadequate grading for the Theme Park paving, $153,477 additional expenses for supervisory personnel and $2,000,000 for overtime premiums. There was testimony to the effect that the total overtime premiums amounted to $3,500,000. Mr. Lapins testified that as much as ten per cent (10%) of this would have been necessary even without the delay. I am not satisfied that all of these overtime premiums

Appendix B

were actually incurred. Mr. Nielsen estimated the overtime to amount to approximately $3,000,000 and I was not satisfied that each of the twelve contractors incurred as much overtime as the testimony appeared to indicate. I am further satisfied that a considerable amount of overtime was necessary to satisfy changes which were made by Warner LeRoy not caused by the delay and that there was a natural need for overtime charges in a complex and novel construction project such as the one here. There were premiums for late ordering as a result of the delay in the following amounts: $3,815 glass for merchandise tents, $7,104 for the ice cream parlor, $57,996 for logs for the Teepee and Western Restaurant, $20,000 for larger than necessary steel in the Dolphin Stadium, $15,959 for extra air freight charges for cable car, flume ride and merchandise tent material, $4,000 for an extra M.D.C. feasibility study, $51,390 for staging building materials in the parking lot, $6,494 for changes in the water supply pipes, $41,446 for watchman's salary at the water plant $37,528 expenses in using trial assembly methods for logs in the Western Restaurant, $3,360 for cleaning stains from the Dolphin Pool, $13,360 for repairing breaks in utility lines, $149,690 extra payments for steel occasioned by the delay as testified to by Mr. Lapins, further testified to by Mr. Nielsen.

There was testimony by Messrs. Lapins and Nielsen with respect to losses occasioned by the insufficient time to obtain competitive bids for work on the Ginger Bread and Yum Yum Restaurants and certain electrical roofing and other work. I am not satisfied by the greater weight of the evidence that any loss was occasioned by the failure to use competitive bidding as I was impressed by other testimony that it was not practical to use competitive bidding in any event on a job like this whether or

not there were delays in question. There was further testimony concerning certain expenses in connection with the discovery of a quicksand condition in the area of the Western Restaurant. Because of the vagueness of the testimony concerning the discovery of this condition and its location, I am not persuaded by the greater weight of the evidence that this would be an item of damage and make no awards therefor. I therefore find in favor of Great Adventure and against Richard Switlik and Stanley Switlik in the amount of $2,727,012 on its claim for increased construction costs occasioned by the second or fraud delay.

3. (b) Great Adventure has an additional claim against both Switliks for lost operating profits which are claimed for June and the first sixteen (16) days of July, 1974. Although the witness Leone's testimony contained further extrapolation and is subject to some doubts as to its accuracy, being based on figures from another year with its different circumstances with respect to weather, economy, etc., it provided me with sufficient information to satisfy me by the greater weight of the evidence that Great Adventure suffered a loss of at least $1,000,000 during the time in question. I am satisfied that Highway I-195 could have been opened by June 1st, if the Park had been opened on that date. I therefore find in favor of Great Adventure and against Richard Switlik and Stanley Switlik in the amount of $1,000,000 on its claim for lost revenues.

Punitive Damages

There remains the claim of Preserve's, Great Adventure and Hardwicke for punitive damages. In my above

referred to letter opinion of July 14, 1976, I referred specifically to my findings as to the acts of the Switliks which I found gave rise to this claim and I shall not repeat them.

I have considered the wealth of Richard Switlik as indicated by the evidence produced. I find that he was the main and driving force in the malicious activities complained of and which I find in fact occurred, and that the damage done was very substantial. Furthermore, it is stipulated that Richard Switlik harbored an intense personal dislike toward some of the principals of the Great Adventure group. However, in resolving the issue of punitive damages, I will consider his financial position as if he has paid the compensatory damages assessed herein. The general theory concerning exemplary damages being to accomplish the purpose of punishment of the wrong done and to deter any further wrong, in the light of the magnitude of the amount of compensatory damages awarded, I will not award any punitive damages to any of the parties.

With respect to the claim for punitive damages against Stanley Switlik, I have considered the evidence concerning his financial condition. I have further considered his age and the influence that Richard Switlik's activities must have had upon Stanley Switlik. He was not the moving party in many of the situations complained of but he participated in the so called 10-C fraud. Again in the light of the magnitude of the compensatory damages, I decline to award any punitive damages to any of the parties against Stanley Switlik.

An order may be presented by the Great Adventure interests in accordance with this Opinion.

Very truly yours,

Robert H. Doherty, Jr.
J.C.C. t/a

APPENDIX C

Opinion of the Superior Court of New Jersey Appellate Division

(Filed—May 31, 1979)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A- 995-77

A-2742-77

STANLEY SWITLIK and WANDA SWITLIK,

Plaintiffs-Appellants and Cross-Respondents,

v.

THE HARDWICKE CORPORATION, GREAT ADVENTURE, INC., and HARDWICKE'S NEW JERSEY PRESERVES, INC.,

Defendants-Respondents and Cross-Appellants,

and

ACKERMAN-NEY ASSOCIATES and WARNER LEROY,

Defendants.

Appendix C

HARDWICKE COMPANIES INCORPORATED, GREAT ADVENTURE, INC., and HARDWICKE'S NEW JERSEY PRESERVES, INC.,

Counterclaim Plaintiffs-Respondents and Cross-Appellants

v.

RICHARD SWITLIK,

Additional Defendant on Counterclaims—Appellant and Cross-Respondent.

Argued May 1, 1979 Decided May 31, 1979

Before Judges Lora, Michels and Larner.

On appeal from the Superior Court of New Jersey, Chancery Division, Ocean County.

Mr. Theodore L. Abeles argued the cause for plaintiffs-appellants and cross-respondents Stanley Switlik and Wanda Switlik, and additional defendant on counterclaims—appellant and cross-respondent Richard Switlik (Messrs. Lum, Biunno & Tompkins, attorneys; Mr. William B. McGuire, of counsel, Messrs. Joseph A. Hoffman, Dominick A. Mazzagetti, Robert J. Kelly and Edward R. McMahon, on the brief).

Mr. Frederick K. Becker argued the cause for defendants and counterclaim Plaintiffs-Respondents and Cross-Appellants Hardwicke Companies, Incorporated,

and Great Adventure, Inc. (successor by merger and change of name to Hardwicke's New Jersey Preserves, Inc., and Great Adventure, Inc.), Messrs. Wilentz, Goldman & Spitzer, attorneys; Mr. Becker, of counsel and on the brief).

PER CURIAM

Plaintiffs Stanley Switlik and Wanda Switlik and additional defendant on counterclaim Richard Switlik appeal from a judgment for liability and an amended final judgment awarding damages and denying application for new trial of the Chancery Division entered following lengthy separate trials on liability and on damages. Counterclaim plaintiffs Hardwicke Companies, Inc., and Great Adventure, Inc. (successor by merger and change of name to Hardwicke's New Jersey Preserves, Inc., and Great Adventure, Inc.), cross-appeal from so much of the amended final judgment awarding damages and denying application for new trial as it denied (1) The Hardwicke Corporation's recovery of compensatory and punitive damages against Stanley Switlik and Richard Switlik, (2) Hardwicke's New Jersey Preserves, Inc., recovery of a portion of its claimed compensatory damages and all punitive damages against Richard Switlik, and (3) Great Adventure, Inc.'s recovery of punitive damages against Richard Switlik and a portion of its claimed compensatory damages and all punitive damages against Stanley Switlik and Richard Switlik, jointly and severally.

We are entirely satisfied from our review of the voluminous record and the arguments presented in these consolidated appeals that the judgments of the trial court is [sic] based on findings of fact which are adequately supported by the evidence; the determination of the trial court on

the motion for a new trial does not constitute a manifest denial of justice, and that all issues of law raised are clearly without merit. R. 2:11-3(e)(1) (A), (C) and (E).

Accordingly, the judgment for liability and the amended final judgment awarding damages and denying application for new trial are affirmed substantially for the reasons expressed by Judge Doherty in his letter opinions of July 14, 1976 and August 26, 1977.

Affirmed.

APPENDIX D

Order of the Supreme Court of New Jersey Denying Certification

(Filed—October 9, 1979)

SUPREME COURT OF NEW JERSEY

C-119 SEPTEMBER TERM 1979

STANLEY SWITLIK, *et al.*,

Plaintiffs-Petitioners,

v.

THE HARDWICKE CORPORATION, *et al.*,

Defendants-Respondents,

and

ACKERMAN-NEY ASSOCIATES, *et al.*,

Defendants,

HARDWICKE COMPANIES INCORPORATED, *et al.*,

Counterclaim Plaintiffs-Respondents,

v.

RICHARD SWITLIK,

Defendant-Petitioner.

Appendix D

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-995-77, A-2742-77 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Mark A. Sullivan, Presiding Justice, at Trenton, this 4th day of October 1979.

STEPHEN W. TOWNSEND
Clerk

A TRUE COPY

STEPHEN W. TOWNSEND
Clerk

APPENDIX E

Corrected Order of the Supreme Court of New Jersey Denying Motion for Reconsideration

(Filed—December 21, 1979)

SUPREME COURT OF NEW JERSEY

M-139 SEPTEMBER TERM 1979

STANLEY SWITLIK, *et al.*,

Plaintiffs-Movants,

v.

THE HARDWICKE CORPORATION, etc., *et al.*,

Defendants-Respondents.

This matter having been duly presented to the Court, it is ORDERED that the motion for reconsideration of denial of petition for certification is denied.

WITNESS, the Honorable Mark A. Sullivan, Presiding Justice, at Trenton, this 20th day of December, 1979.

STEPHEN W. TOWNSEND
Clerk

A TRUE COPY

STEPHEN W. TOWNSEND
Clerk

APPENDIX F

Order of the Supreme Court of the United States Granting Extension of Time to File Petition for Certiorari

(Filed—December 31, 1979)

SUPREME COURT OF THE UNITED STATES

No. A-560

STANLEY SWITLIK, *et al.*,

Petitioners,

v.

HARDWICKE CORP., *et al.*,

UPON CONSIDERATION of the application of counsel for petitioners,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 7, 1980.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 31
day of December, 1979.

APPENDIX G

Order of the Supreme Court of New Jersey Filed January 18, 1980 Staying Judgment Pending Petitioners' Application for a Stay to the Supreme Court of the United States

(Filed—January 18, 1980)

SUPREME COURT OF NEW JERSEY

M340 SEPTEMBER TERM 1979

STANLEY SWITLIK, *et al.*,

Plaintiffs-Movants,

v.

THE HARDWICKE CORPORATION, *et al.*,

Defendants-Respondents.

This matter having been duly presented to the Court, it is ORDERED that the motion to stay the judgment of the Supreme Court is granted, said stay to continue in effect until February 11, 1980, provided that the movant make application to the Supreme Court of the United States for a stay pending petition for a writ of *certiorari* on or before January 25, 1980; and it is further

ORDERED that failure to make such application for stay on or before January 25, 1980, shall cause the stay of judgment provided for herein to dissolve automatically.

Appendix G

WITNESS, the Honorable Mark A. Sullivan, Presiding Justice, at Trenton, this 14th day of January, 1980.

STEPHEN W. TOWNSEND
Clerk

A TRUE COPY

STEPHEN W. TOWNSEND
Clerk

APPENDIX H

Corrected Order of the Supreme Court of New Jersey Filed January 24, 1980 Extending Time for Filing Petitioners' Application for a Stay With the Supreme Court of the United States

SUPREME COURT OF NEW JERSEY

M-340 SEPTEMBER TERM 1979

STANLEY SWITLIK, *et al.*,

Plaintiffs-Movants,

v.

THE HARDWICKE CORPORATION, *et al.*,

Defendants-Respondents.

This matter having been duly presented to the Court, it is ORDERED that the motion to stay the judgment of the Supreme Court is granted, said stay to continue in effect until February 11, 1980, provided that the movant make application to the Supreme Court of the United States for a stay pending petition for a writ of *certiorari* on or before January 28, 1980; and it is further

ORDERED that failure to make such application for stay on or before January 28, 1980, shall cause the stay of judgment provided for herein to dissolve automatically.

Appendix H

WITNESS, the Honorable Mark A. Sullivan, Presiding Justice at Trenton, this 14th day of January, 1980.

STEPHEN W. TOWNSEND
Clerk

A TRUE COPY

STEPHEN W. TOWNSEND
Clerk

D.P.

APPENDIX I

Consent Order Filed January 25, 1980 by the Supreme Court of New Jersey Further Extending Time for Filing Petitioners' Application for a Stay With the Supreme Court of the United States

(Filed—January 27, 1980)

SUPREME COURT OF NEW JERSEY

DOCKET No.

STANLEY SWITLIK and WANDA SWITLIK,

Plaintiffs-Petitioners,

v.

THE HARDWICKE CORPORATION; GREAT ADVENTURE, INC.; ACKERMAN-NEY ASSOCIATES; WARNER LEROY and HARDWICKE'S NEW JERSEY PRESERVES, INC., jointly, severally and in the alternative,

Defendants-Respondents.

HARDWICKE COMPANIES INCORPORATION; GREAT ADVENTURE, INC. and HARDWICKE'S NEW JERSEY PRESERVES, INC.

Counterclaim-Plaintiffs-Respondents,

v.

RICHARD SWITLIK,

Additional Defendant-Petitioner on Counterclaims.

Appendix I

THIS MATTER being opened to the Court by Lum, Biunno & Tompkins, attorneys for petitioners, William J. Prout, Jr., Esq. on Verified Petition for an extension of time to file Application with United States Supreme Court for Stay of Judgment in this matter, and it appearing that Frederick K. Becker, Esq., attorney for respondents, having consented thereto; and good cause having been shown;

IT IS on this 25th day of January, 1980,

ORDERED, that the time within which petitioners may apply to the United States Supreme Court be and hereby is extended until and including February 4, 1980.

MARK A. SULLIVAN, P.J.
By: STEPHEN W. TOWNSEND

APPENDIX J

Letter from Supreme Court of the United States, Office of the Clerk, Informing Petitioners of Denial of Application for Stay of Judgment

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

February 5, 1980

William B. McGuire, Esquire
Lum, Biunno & Thompkins
550 Broad Street
Newark, New Jersey 07102

Re: Stanley Switlik, et al.
v. Hardwicke Corporation, et al.
No. A-662

Dear Mr. McGuire:

Your application for stay of judgment in the above-entitled cause was presented to Mr. Justice Brennan, who has endorsed thereon the following:

"Denied

Wm. J. Brennan, Jr.

2/5/80"

Very truly yours,

MICHAEL RODAK, JR., Clerk
By: PATRICIA A. DEAN
Assistant Clerk

gn

Appendix J

cc: Frederick K. Becker, Esq.
Wilentz, Goldman, & Spitzer
900 Route 9
Woodbridge, NJ 07095

Stephen W. Townsend, Esq. (Your No. M-340 Sept. Term, 1979)
Clerk, Supreme Court of New Jersey

Supreme Court, U.
FILED
APR 7 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1382

STANLEY SWITLIK and RICHARD SWITLIK,

Petitioners,

v.

HARDWICKE COMPANIES INCORPORATED and GREAT ADVENTURE, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
RESTATED QUESTION PRESENTED NO. 1	2
STATEMENT OF CASE	3
The Lot 10C Fraud	5
Interference With Contract	6
Interference With Prospective Economic Advantage	7
REASONS FOR DENIAL OF WRIT	11
A. The Petition Does Not Meet The Criteria of Rule 19 For a Grant of Certiorari	11
B. The Alleged Free Speech Argument Is Not An Issue of Importance In This Case And Could Not In Any Event Taint The Wholly Independent Findings Of Fraud and Malicious Inteference With Contract	12
C. The Trial Court Decisions Raise No Issues of Due Process Under The Fourteenth Amendment	18
CONCLUSION	19

TABLE OF AUTHORITIES

	PAGE
CASES	
Beane v. McMullen, 265 Md. 585, 291 A.2d 37 (Ct. App. 1972)	15
California Transport v. Trucking Unlimited, 404 U.S. 508, 515 (1971)	16
Cardinale v. Louisiana, 394 U.S. 437 (1969)	18
Culcal Sylco, Inc. v. Vornado, Inc., 103 Cal. Rptr. 419, 26 Cal. App. 3d 879 (Ct. of Appeals 1972)	15
Lewis Kamm, Inc. v. Flink, 113 N.J.L. 582, 175 Atl. 62(E.&A. 1934) ..	15
Middlesex Concrete Corp. v. Carteret Indust. Association, 39 N.J. 507, 189 A.2d 213 (1962).....	15
Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955)	11,12
UNITED STATES CONSTITUTION	
First Amendment	2,12,15,16
Fourteenth Amendment	18
NEW JERSEY COURT RULES	
R. 1:7-4	18,19
UNITED STATES SUPREME COURT RULES	
U.S. Sup. Ct. R. 19	4,11
U.S. Sup. Ct. R. 19(1)(a)	11
U.S. Sup. Ct. R. 21(4)	2n.

TABLE OF AUTHORITIES

	PAGE
TREATISES	
1 Harper and James, The Law of Torts, Section 6.12, page 514 (1956)	14
Prosser, The Law of Torts, (4th Ed. 1971)	
Section 129, p. 942	14,15
Section 129, p. 936	15
Section 120, p. 850	15

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1382

STANLEY SWITLIK and RICHARD SWITLIK,

Petitioners,

- v. -

HARDWICKE COMPANIES INCORPORATED and GREAT ADVENTURE, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Great Adventure, Inc.,* respectfully opposes the issuance of a writ of certiorari to review the judgment of the

* Respondent Great Adventure, Inc. is successor in interest by merger and by change of name to both Great Adventure, Inc., which operated the Great Adventure park, and Hardwicke's New Jersey Preserves, Inc., which owned the underlying land. Both corporations were at the time of the commencement of the lawsuit owned by Hardwicke Companies Incorporated ("Hardwicke"), also a respondent-cross-

(Footnote continued on following page)

Superior Court of New Jersey, Appellate Division, entered in this case on May 31, 1979.*

RESTATED QUESTION PRESENTED NO. 1**

In determining liability for the tort of malicious interference with prospective economic advantage, does the First Amendment preclude consideration of maliciously motivated and unjustified acts intended to cause material injury if such acts could otherwise arguably be within the ambit of protected speech?

(Footnote continued from preceding page)
appellant below, but have since been sold. Throughout this brief, both of respondent's predecessors will be referred to as "Great Adventure". Hardwicke's claim against the Switliks was denied by the Trial Court and that denial was affirmed by the Superior Court of New Jersey, Appellate Division. Hardwicke is captioned as a respondent herein because of its interest in the Appellate Division proceedings (U.S. Sup. Ct. R. 21(4)) but it files no brief herein. Others who were named as defendants were either never served or were dismissed from the lawsuit and they are not captioned as respondents.

* The New Jersey Supreme Court denied a petition for certification to review that Appellate Division judgment and subsequently denied a motion to reconsider that denial of certification (Petition, Apps. D and E).

** Question Presented No. 2 has not been restated.

STATEMENT OF CASE

The salient facts are set forth to correct substantially misleading statements in, and material omissions from, the petition.

This is essentially a case of common law fraud by petitioners Stanley Switlik and Richard Switlik and the enormous damages which were the consequences of that fraud (damages awarded for fraud were in the sum of $4,912,043*); and Richard Switlik's interference with Great Adventure's contract rights and the substantial damage which resulted therefrom (damages awarded for interference with contract rights were in the sum of $1,318,511*). The case also involves tortious interference by Richard Switlik with Great Adventure's economic expectancy for which relatively little damages were awarded ($117,053*)

The petition nowhere advises this Court that the fraud of Stanley Switlik had been determined in a prior trial and affirmed on appeal prior to the second and third trials which are the subject matter of the petition. No application for further review of that initial finding of fraud was made to the Supreme Court of New Jersey or to this Court and that finding of Stanley Switlik's fraud is res judicata.

This case presented the Trial Court

---

* Figures include pre-judgment interest.

with the straightforward task of applying essentially uncontroverted facts to generally accepted principles of law to determine: (1) the amount of damages to be assessed against Stanley Switlik for his previously finally adjudicated fraud; (2) whether fraud and malicious interference with contract rights and with prospective economic advantage had been proven against Richard Switlik; and (3) once liability of Richard Switlik was found, assessing the amount of damages caused by his fraudulent and malicious conduct.

There is nothing raised by petitioner, and nothing in this case, to satisfy the criteria of this Court's Rule 19 for the grant of a writ of certiorari. There are no "special and important reasons" for such a grant. There is no "federal question of substance" involved. Rather, the case centered around the sale by Stanley and Wanda Switlik of a large portion of their New Jersey estate to Great Adventure for development as a multi-million dollar wild animal safari and entertainment park, a fraud relating to that sale, interference by Richard Switlik with the contract of sale, and malicious interference by Richard Switlik with the development of the park. The only unusual feature of the case is the enormity of the fraud perpetrated by petitioner.

The Lot 10C Fraud

The fraud related to a triangular-shaped parcel of land called Lot 10C which was so located as to substantially cut across the land being sold to Great Adventure at its narrowest point. Prior to the sale, Stanley Switlik and his son, Richard Switlik, in order to induce Great Adventure to exclude Lot 10C from the property being purchased from Stanley Switlik, had represented Lot 10C as not being owned by Stanley Switlik but rather as having been conveyed by Stanley Switlik to the State of New Jersey years before. Great Adventure was taking steps to obtain title from the State of New Jersey. Unknown to Great Adventure, while the deed conveying the Switlik lands to Great Adventure was still in escrow pending the completion of the closing of title, Richard Switlik obtained and caused to be recorded an acknowledgment from the State of his father's "ownership" of Lot 10C in the form of a "corrected deed". Shortly after the sale was complete, Stanley Switlik announced that he was the owner of Lot 10C.

Because of its location, the ownership of Lot 10C by a party hostile to development of the park would have prevented the park from being built. The sudden post-closing claim of the Switliks to ownership of Lot 10C,

therefore, forced Great Adventure to hold back construction of the most costly portion of the park until the Lot 10C problem was resolved. The forced hold back resulted in substantial damage in the form of increased construction costs and lost profits.

Interference With Contract

Stanley and Wanda Switlik had contracted in 1972 to sell a substantial portion of their property in Jackson Township, New Jersey to Great Adventure. As a result of interference by Richard Switlik, their son who had expected to inherit his parent's property, there were problems with the transaction beginning nine months after their contract was signed. The eventual closing of title resulted only after Great Adventure was forced to bring a specific performance action because Stanley and Wanda Switlik refused to honor the contract of sale of the property. While his parents were away at their winter home in Florida, Richard Switlik, attempted on his own to change the terms of his parent's contract of sale with Great Adventure in a number of material respects. When Great Adventure would not accede to his demands, Richard Switlik convinced his parents to breach the agreement.

Although a specific performance suit

was brought by Great Adventure, it had to be settled by a closing of title on terms unfavorable to Great Adventure in order to avoid further delay. The reduced benefits so received resulted in substantial damages to Great Adventure which had proceeded with its development efforts in reliance on the terms of the original contract. These damages were awarded to Great Adventure in connection with the finding of Richard Switlik's liability for malicious interference with Great Adventure's contractual relations.

Interference With
Prospective Economic Advantage

Aside from his fraud and malicious interference with the contract, the acts of malicious interference with Great Adventure's prospective economic advantage committed by Richard Switlik and proved at trial, included:

(a) inducing a third party to object on his behalf to Great Adventure's application for a zoning variance so that it would appear that the objection was being made by a Girl Scout Council;

(b) nocturnal pulling of survey stakes and dumping of sand in a drainage ditch to impede construction;

(c) arranging financing for a lawsuit by neighboring municipalities attacking Great Adventure's municipal approvals;

(d) attempting to cause the New Jersey Fish & Game Commission to prevent fencing of the animal park by declaring a deer run across the park thereby again attempting to cause the park to be bifurcated; and

(e) purchasing land in the name of a nominee for the purpose of bringing a legal proceeding ostensibly by a land-locked third party, to open by injunction an allegedly public stage coach road across the park.

After the sale, Stanley Switlik also disputed the location of an exterior boundary of the land he had conveyed. He commenced this suit against Great Adventure and Hardwicke first claiming trespass and later amending his claim to include reformation of the deed. Great Adventure and Hardwicke counterclaimed in this litigation to obtain title to Lot 10C and, adding Richard Switlik as a party, immediately counterclaimed against petitioners for the damages caused by the Switliks fraud as to Lot 10C. Additional claims were asserted against Richard Switlik because he had induced Stanley Switlik to breach the original contract of sale and had otherwise maliciously interfered with Great

Adventure's business for his own pecuniary ends.

Prior to the first trial, the results of which include the finding of Stanley Switlik's fraud and are not the subject matter of this petition, the Trial Court determined to initially try the issues relating to title, leaving the damage claims of both sides for future trial. After a lengthy trial, the Honorable Mark Addison found, among other findings, that Stanley Switlik had defrauded Great Adventure regarding the ownership of Lot 10C and imposed a constructive trust requiring its conveyance by Stanley Switlik to Great Adventure. That decision was unanimously affirmed by the Appellate Division of the Superior Court on February 2, 1976, and further review either to the Supreme Court of New Jersey or to this Court was not sought.

Trial of the remaining issues, i.e., Richard Switlik's liability for fraud, malicious interference with contract, and malicious interference with prospective economic advantage and the quantum of damages to be assessed against both Switliks, was bifurcated. The remaining questions of liability were tried before a different trial Judge (Honorable Robert H. Doherty, Jr.). After the second trial, Judge Doherty found

that Richard Switlik was also liable for the Lot 10C fraud, and was liable as well for his malicious interference with Great Adventure's contractual rights and for his malicious interference with Great Adventure's economic expectancy (Petition, App. A). The damage trial was subsequently conducted before Judge Doherty who awarded the aforesaid damages in favor of Great Adventure. Judge Doherty rejected substantial other damage claims of Great Adventure and all damage claims of Hardwicke (Petition, App. B).

After review of the entire record, the findings of Judge Doherty were unanimously affirmed by the Appellate Division of the Superior Court of New Jersey (the cross-appeals of Great Adventure and Hardwicke as to rejected damage claims thereby being denied), the Appellate Division stating that:

> "[T]he judgments of the trial court is [sic] based on findings of fact which are adequately supported by the evidence; the determination of the trial court on the motion for a new trial does not constitute a manifest denial of justice, and that all issues of law raised are clearly without merit. R.2:11-3(e)(1)(A),(C) and (E)." (Petition, App. C)

Petitioners then petitioned the Supreme Court of New Jersey for certification to review that Appellate Decision determination, which petition was denied (Petition, App. D). A subsequent motion by the Switliks

seeking reconsideration of the denial of certification was also denied by the Supreme Court of New Jersey. (Petition, App. E)

REASONS FOR DENIAL OF WRIT

A. The Petition Does Not Meet The Criteria of Rule 19 For a Grant of Certiorari

This is a case of fraud and malicious interference in connection with a land transaction. The finding of fraud by one petitioner -- Stanley Switlik -- is res judicata and not even before this Court. There are no "special and important reasons" for a grant of certiorari. There has been no decision of "a federal question of substance not theretofore determined by this court" nor has any federal question of substance been "decided . . . in a way probably not in accord with applicable decisions of this court." U.S. Sup. Ct. R. 19(1)(a). In fact, no federal question of substance is even presented by the petition and there is nothing raised by petitioners to satisfy the test of Rule 19 of this Court. Even if a constitutional issue really was presented by the petition, this would be an inappropriate case for a grant of certiorari because, as stated by Chief Justice Vinson in Rice v. Sioux City Memorial Park

Cemetery, 349 U.S. 70 (1955):

> "'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion." 349 U.S. at 74.

B. The Alleged "Free Speech Issue" Is Not An Issue of Importance In This Case and Could Not Taint The Wholly Independent Findings of Fraud and Malicious Inteference With Contract

Petitioners contend that certiorari should be granted primarily because the adjudication of liability against Richard Switlik for damages for his interference with Great Adventure's prospective economic advantage violates the First Amendment to the United States Constitution in that such finding of liability allegedly inhibits "free speech".* Recognizing that this argument,

* This so-called "free-speech" argument which Richard Switlik is now emphasizing played a minimal role in the appeal of this case up to the time of the petition (Petition, pp. 9-14). It consumed seven pages of the Switliks' 124 page brief to the Appellate Division of the Superior Court and was not even raised in their petition for certification to the Supreme Court of New Jersey or in their motion to that Court for reconsideration of its denial of certification.

even it had merit which it does not, would affect only the damage award of $117,053 and not the damage awards of $4,912,043 (fraud) and $1,318,511 (malicious intereference with contract), the Switliks further argue that the alleged First Amendment violation somehow tainted the entire case including, at least by implication, the finding of Stanley Switlik's fraud which has already been finally adjudicated and is res judicata. Neither argument has merit.

(a) Consideration of the issue of Richard Switlik's malicious interference with prospective economic advantage involved a determination by the Trial Court that the acts of Richard Switlik were predominantly, if not solely, motivated by malicious purposes, and thus satisfied the requirement of legal malice. The evidence of Richard Switlik's appearances before the Planning Board and the multitude of letters sent by him to various governmental agencies (including his efforts to have a deer run declared by the State to prevent fencing of the animal areas), to which the petition refers, was neither offered nor received as evidence of wrongdoing but solely for the purpose of tending to prove Richard Switlik's malicious motivation with respect to conduct which was wrongful. Thus,

this evidence was not the subject of any damage award.

Moreover, the argument at best presents a factual issue resolved at trial against petitioner Richard Switlik. The trial proof overwhelmingly demonstrated that Richard Switlik's acts of interference were intended to interfere, thus creating a prima facie case of malicious interference which Richard Switlik could have rebutted as a factual matter by showing that the acts were justified. 1 Harper and James, The Law of Torts, Section 6.12, page 514 (1956); see also Prosser, The Law of Torts, Section 129, p. 942 (4th Ed. 1971). Indeed, the entire thrust of Richard Switlik's defense below was that his interference was justified by his status as an adjoining landowner. He failed, however, to carry that burden chiefly because there was nothing in the record to suggest that he was motivated by concern about his adjoining property. Rather, his acts were shown to be part of a pattern of conduct calculated to stop development of the park by any means possible because he disagreed with his father's decision to sell the land he expected to inherit, because he grew to intensely dislike management of Great Adventure, and because he wanted the location of the land to be shifted on to the less desirable land to the east which he at-

tempted to sell to Great Adventure. Many of Richard Switlik's activities were characterized by trespass and subterfuge and none could be said to be limited to "reasonable and proper means." Prosser, The Law of Torts, Section 129, p. 936 (4th Ed. 1971); Lewis Kamm, Inc. v. Flink, 113 N.J.L. 582, 175 A. 62 (E.&A. 1934).

Liability for unjustified acts of maliciously motivated interference otherwise lawful is consistent with existing common law in New Jersey (Middlesex Concrete Corp. v. Carteret Indust. Association, 39 N.J. 507, 189 A.2d 213 (1962)), and elsewhere (Prosser, The Law of Torts, §129, pp. 943 et. seq. (4th Ed. 1971); Beane v. McMullen, 265 Md. 585, 291 A.2d 37 (Ct. App. 1972); see Culcal Sylco, Inc. v. Vornado, Inc., 103 Cal. Rptr. 419, 26 Cal. App. 3d 879 (Ct. of Appeals 1972); and such law adequately protects justifiable governmental protest for proper purposes. Moreover, maliciously motivated litigation has never been permitted to exist free of restraint, malicious prosecution and abuse of process being traditionally recognized as grounds for civil liability. Prosser, The Law of Torts §120, pp. 850 et. seq. (4th Ed. 1971). Similarly, the First

Amendment does not protect unlawful end results, such as violation of the anti-trust laws, even where the means used in the violation would otherwise be lawful; and, most importantly, "First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils' [citation omitted] which the legislature has the power to control." California Transport v. Trucking Unlimited, 404 U.S. 508, 515 (1971). As indicated, petitioner Richard Switlik's real problem was rather that, as on the more significant issues in the case, he failed to satisfy the trier of fact that his acts of interference were for a proper purpose. He now presents purported First Amendment rights as the very "pretext" warned against in California Transport, to justify the substantive evils which he maliciously caused to Great Adventure.

Boiled down to its essence, the issue of alleged First Amendment dimension presented by the petition involves really nothing more than an evidentiary principle relating to proof of the common law tort of malicious interference with prospective economic advantage. It certainly presents no issue of importance which should be cognizable before this Court. Even as a question of evidence, there

is nothing unusual about this case. A person's motive, like any other issue, can be proved indirectly by his conduct regardless of the legality of that conduct. As with intent, motive is rarely established by other than circumstantial evidence. For this reason, all evidence of Richard Switlik's malicious attitude toward Great Adventure was probative of his motivation in performing unlawful acts which interfered with Great Adventure's development efforts.

(b) The judgment for damages caused by the fraud was so adjudicated and is wholly unaffected by the so-called "free-speech" argument. Similarly, the arguments now emphasized as grounds for certiorari in no way affect the judgment awarded for Richard Switlik's malicious interference with contractual relations. The findings of Richard Switlik's liability for fraud and malicious interference with contract are wholly independent of the separate finding of his liability for malicious interference with prospective economic advantage. The damage findings for each tort were also arrived at based upon specific and detailed evidence relating losses and expenses incurred to the particular conduct for which liability was found. This is best demonstrated by the fact that Stanley Switlik's fraud was adjudicated in the first trial be-

fore Judge Addison at which trial questions of Richard Switlik's malicious interference with prospective economic advantage were not even considered. The suggestion of some over-all "taint" in the context of this massive non-jury litigation is plainly specious. Even in a jury case this argument would have been frivolous.

C. The Trial Court Decisions Raise No Issues of Due Process Under The Fourteenth Amendment

The only other issue raised by Petitioners is with respect to the quality of the Trial Court conclusions, advanced as an alleged deprivation of due process (Petition, pp. 22-24). While petitioners did complain of the absence of legal citation by the Trial Court on their appeal to the Appellate Division, this due process argument was first asserted only on their motion for reconsideration of the New Jersey Supreme Court's denial of certification. This Court will normally not consider issues which have not been presented in the courts below. Cardinale v. Louisiana, 394 U.S. 437 (1969). In any event, both as an issue of due process and as a matter of New Jersey law, this claim is clearly frivolous.

Petitioners contend that Rule 1:7-4

of the New Jersey Rules of Court sets forth the minimum standards of due process. Yet the opinions rendered by the Trial Court clearly fit within the standards of that Rule which requires only that the court "find the facts and state its conclusions of law thereon." R.1:7-4 (emphasis added). As is evident from review of the Trial Court opinions, Judge Doherty found the facts and stated conclusions of law based on those facts. Petitioners have had no problem on appeal in identifying and presenting arguments in respect of the factual findings and legal conclusions which are not in their favor.

CONCLUSION

For the reasons stated, the Petition for Certiorari should be denied.

Respectfully submitted,

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April 7, 1980

Supreme Court, U. S.
FILED
APR 15 1980
ROBERT L. STRACK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1382

STANLEY SWITLIK and RICHARD SWITLIK,
Petitioners,

—*v.*—

THE HARDWICKE CORPORATION; HARDWICKE COMPANIES INCORPORATED; GREAT ADVENTURE, INC.; ACKERMAN-NEY ASSOCIATES; WARNER LEROY and HARDWICKE'S NEW JERSEY PRESERVES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

PETITIONERS' REPLY MEMORANDUM

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TABLE OF CONTENTS

	PAGE
PETITIONERS' REPLY MEMORANDUM	1-5
APPENDIX A—Letter Memorandum Filed with the New Jersey Supreme Court	1a

United States Constitution Cited

First Amendment	2-4

Rules Cited

Rule 2:12-7(a)	3
Rule 2:12-7(b)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1382

STANLEY SWITLIK and RICHARD SWITLIK,
Petitioners,

—*v.*—

THE HARDWICKE CORPORATION; HARDWICKE COMPANIES INCORPORATED; GREAT ADVENTURE, INC.; ACKERMAN-NEY ASSOCIATES; WARNER LEROY and HARDWICKE'S NEW JERSEY PRESERVES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

PETITIONERS' REPLY MEMORANDUM

The brief submitted in opposition to the petition for certiorari raises a number of issues not addressed in the petition, only one of which, however, warrants a reply. In the footnote appearing at page 12 of the respondent's brief, an apparent effort is made to dis-

suade this Court from granting the petition, the text of the footnote reading as follows:

> This so-called "free-speech" argument which Richard Switlik is now emphasizing played a minimal role in the appeal of this case up to the time of the petition (Petition, pp. 9-14). It consumed seven pages of the Switliks' 124 page brief to the Appellate Division of the Superior Court and was not even raised in their petition for certification to the Supreme Court of New Jersey or in their motion to that Court for reconsideration of its denial of certification [Rb12n*].

To begin, it is implicitly conceded by respondent that the First Amendment issue *was indeed raised* in the Superior Court of New Jersey, Appellate Division. Instead of acknowledging that petitioners have complied with the preconditions of raising federal constitutional issues in this Court—and moving on to discuss the substance of these issues—respondent makes the altogether irrelevant observation that the First Amendment issue "consumed seven pages of the [petitioners'] 124 page brief to the Appellate Division of the Superior Court . . .," an observation designed to suggest that this issue not now be considered. Apart from the invalidity of respondent's arithmetical comparison,[1] there is no quantitative requirement with respect to raising issues below

[1] Petitioners' brief to the Appellate Division, although a total of 124 pages, contained only 60 or so pages of legal argument, the balance comprised of a Procedural History and a Statement of Facts. Thus, the seven pages of legal argument devoted to the First Amendment issue, when compared to the total number of pages devoted to all legal argument, takes on a significance far greater than respondent would have this Court believe.

that compels a litigant to devote a certain number of pages of discussion to a federal constitutional issue, lest he waive his right to renew that argument in this Court.

With regard to respondent's assertion that the First Amendment issue was not raised in either the petition for certification to the Supreme Court of New Jersey or the motion for reconsideration of the denial thereof, the following should be noted. Rule 2:12-7(a) of the New Jersey Rules of Court provides, *inter alia,* that a petition for certification "* * * shall be in the form of a brief * * * not exceeding 15 pages if printed or 20 pages if otherwise reproduced or typed, exclusive of table of contents, citations and appendix * * *." In view of the page limitation regarding petitions for certification to the New Jersey Supreme Court, it is clear that the petition itself cannot explicitly put before the Court all the issues raised below, particularly in cases such as the one herein where countless issues have been raised in the Appellate Division. In order to alleviate this difficulty, Rule 2:12-7(b) provides that, within 10 days after filing the Notice of Petition for Certification, 9 copies of petitioner's Appellate Division brief and appendix shall be filed with the Clerk of the Supreme Court. Thus, once petitioners filed the required copies of their Appellate Division brief with the New Jersey Supreme Court, the First Amendment issue raised herein was squarely before it.

Finally, it should be pointed out that, after petitioners filed their Motion for Reconsideration in the New Jersey Supreme Court, and after respondent replied thereto, petitioners filed a letter memorandum with the New Jersey Supreme Court (attached hereto as Appendix "A"), before the Motion was decided, wherein they explicitly stated:

> Hardwicke's claim that acts unrelated to the contract of sale involving Richard also constituted interference is plainly frivolous, and an obvious effort to distract this Court from the legal error committed by the courts below regarding the privilege of an agent. Each one of the alleged acts to which Hardwicke refers (Rb Rp. 10*) would have been within the general scope of Richard's agency, an agency which Hardwicke has repeatedly recognized. Moreover, many of these acts, *independent of the question of agency,* are fully protected by the First and Fourteenth Amendments to the United States Constitution [Petitioners' letter to the New Jersey Supreme Court, dated November 29, 1979; emphasis in the original].

In view of the foregoing, it is somewhat disingenuous of respondent to suggest that the New Jersey Supreme Court was unaware of petitioners' First Amendment argument.

Except for respondent's suggestion that petitioners did not properly raise the federal constitutional issues below —a suggestion which for the reasons stated heretofore has no merit—respondent has not even attempted to deal with the substantive considerations raised in petitioners' application. Indeed, respondent has all but ignored the decisions of this Court which petitioners discussed in their petition, relying instead on cases interpreting various states' common law in the context of tortious interference with either prospective economic advantage or contract. Precisely the issues which petitioners seek to have this Court review, respondent sidesteps. Perhaps that is because there is no constitutionally sound basis upon which to oppose petitioners' arguments. Under the circumstances, petitioners submit that a writ of certiorari should

issue in this matter to review the judgment and opinion of the Superior Court of New Jersey, Appelalte Division.

Respectfully submitted,

WILLIAM B. MCGUIRE
Counsel for Petitioners, Stanley and Richard Switlik.

April 14, 1980.

[APPENDIX FOLLOWS]

APPENDIX A

Letter Memorandum Filed with the New Jersey Supreme Court

[Letterhead of Lum, Biunno & Tompkins]

November 29, 1979

The Honorable Justices of the
Supreme Court of New Jersey
State House Annex
Trenton, New Jersey 08625

Re: *Stanley Switlik and Wanda Switlik* v. *The Hardwicke Corporation, etc., et al.*: Motion for Reconsideration of Denial of Certification (Petition for Certification Docket No. 16,201; Denial of Certification Docket No. C-119; Motion for Reconsideration Docket No.)

Dear Justices:

We have reviewed the respondents' brief, received by us on November 26, 1979, answering the brief filed by us in petitioners' behalf in support of their motion for reconsideration. This reply is impelled not by respondents' unwarranted hyperbole, nor by the personal attacks in respondents' brief on one of the petitioners, but, rather, because of material omissions and inaccuracies which appear therein.

We shall endeavor to deal, as summarily as possible, both with certain fundamental errors contained in the respondents' answering brief, and their perhaps unwitting admissions of circumstances which support certification.

Appendix A

I.

Petitioners have pointed out that essential elements of the tort of fraud, including alleged causally related damages, were neither proved nor found. Respondents were required to prove, *inter alia,* a material defect in title. Hardwicke now responds that determining the "exact" location of 10C was unnecessary. This response, particularly the calculated use of the word "exact," is obviously designed to create the impression that Hardwicke was aware of a close approximation of the location and size, and *a fortiori* the existence, of Lot 10C. No response could be more disingenuous, as Hardwicke's direct statement to the Appellate Division in its brief on the appeal from the Addison decision makes abundantly clear:

> To this day the *location and existence* of Lot 10C has not been established. It can be done only by a survey of hundreds of acres conveyed by Switlik to the State of New Jersey in 1964. This has never been done (Emphasis supplied; Pet. App. p. 34).*

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* References used herein are:

Pet. App. — Appendix to Petition for Certification.

Sa — Appendix to Switlik Brief in Appellate Division.

Pet. Cert. — Petition for Certification.

PbR — Petitioners' Brief in Support of Reconsideration.

RbR — Respondents' Brief on Reconsideration.

T// — Transcript with appropriate date.

Appendix A

Equally misleading is Hardwicke's most recent assertion that the location of 10C was regarded as significant. This is wholly belied by Hardwicke's representation in its brief on the Addison appeal:

> Hardwicke was prepared to acquire the Switlik property from the Switliks despite the Lot 10C imperfection. There appeared to be adequate room for passage north of Lot 10C (Sa 361).

Beyond its contradictory positions to different appellate tribunals in New Jersey, Hardwicke has also failed to acknowledge its devastating written admissions to the executive branch of New Jersey state government at the time in issue (P442a, 444a) that there was a question whether 10C existed, where it was located and that it was "indeterminate" in size and location, of no more than ½ an acre, and not worth a survey to find, since its value was substantially less than the cost of a survey.

Hardwicke's argument that the fear of ownership of 10C by the Switliks, rather than by the State of New Jersey, is insufficient to obviate the need for finding whether 10C existed. If 10C did not exist, were small, or could not affect the park, who owned it obviously would be unimportant, and no legitimate claim could have been made against Stanley Switlik for failure to transfer it. Location, size, and existence were therefore essential to be proved for any successful claim. On the other hand, if 10C were shown to be important to Hardwicke when located, and were owned by the State of New Jersey, Hardwicke could not assume, as they suggest, that the State would quickly surrender its valuable rights, that the approval of the State House Commission would probably follow in any given time frame, or that Hardwicke could use the state lands in the interim.

Clearly then, despite its most recent efforts to disguise previous assertions of record, Hardwicke has utterly failed to refute petitioners' position that New Jersey precedent regarding fraud requires proof of materiality of fact, falsity, reliance and casually related damages.

On the matter of malicious interference, we believe the Court should read respondents' presentation as acknowledging that Richard Switlik was the negotiating agent for his father. Indeed, in light of the express representations to exactly that effect by Hardwicke in other litigation between the same parties, previously referred to (PbR p. 15 ¶15; Pet. Cert. p. 6), and Judge Addison's finding, Hardwicke could no no less, although its Appellate Division Brief directly denied the agency relationship. What appears to be the basis for respondents' argument is that Richard, as agent for his father, should not be protected if he was acting in his own interest. Apart from that issue having never been resolved by this Court, and itself a basis for granting certification, respondent acknowledges that Stanley Switlik demanded the very clauses which his son had requested. (RbR p. 22). As the Court is aware, that, in and of itself, constitutes proper delegation and ratification, and thus independently makes the acts of Richard, from their commencement, the acts of his prinicpal. That acknowledgement is also a basis for granting certification.

We can understand why an attempt would be made by respondents to distinguish Richard from the interests of his father for the purpose of creating a large claim. But each of the clauses sought in the contract between Hardwicke and Switlik (as previously demanded by Stanley Switlik's attorney on his client (Stanley) instructions (PbR p. 12 ¶5)), now forming the basis for the judgment

against Richard for interference, was a change which benefited the father, a party to the contract, as seller, and not Richard. It would be a significant perversion of the law to claim that such acts would solely serve the benefit of the agent. The obvious intention of this perversion is the avoidance of what we believe is the privilege of an agent against liability for interference. Again, this is a legal question of significant public importance, satisfying one of the criteria enumerated in R. 2:12-4.

Hardwicke's claim that acts unrelated to the contract of sale involving Richard also constituted interference is plainly frivolous, and an obvious effort to distract this Court from the legal error committed by the courts below regarding the privilege of an agent. Each one of the alleged acts to which Hardwicke refers (RbR p. 10*) would have been within the general scope of Richard's agency, an agency which Hardwicke has repeatedly recognized. Moreover, many of these acts, *independent of the question of agency,* are fully protected by the First and Fourteenth Amendments to the United States Constitution.

II.

Without intending to diminish any of the issues raised in Petitioners' brief on reconsideration, and in no way conceding any of the points in respondents' brief not addressed specifically herein, we discretely discuss the following two aspects of respondents' brief.

Appendix A

A.

CAUSATION AS TO FRAUD CLAIM

Petitioners have pointed out to this Court Hardwicke's formal representation to the trial court that, independent of any other reason, the delay in getting title until June 21, 1973 caused the alleged delay in opening the park. In response, in its most recent brief filed with this Court, Hardwicke attempts to disavow this fatal admission by stating that "the Switliks' assertion of title to Lot 10C caused it to hold back development of the entertainment portion of the park, *even including th development of preliminary drawings and floor plans for the site plan application* [Emphasis supplied; RbR at p. 18]."

We call the Court's attention to what must be obvious: The respondents' effort to demonstrate that the alleged fraud, *rather than failure to obtain final site plan approval from the Jackson Township Planning Board,* caused the delay in opening, contradicting its own trial brief, is wholly unaccompanied by citation to the record. This absence of supporting record reference is due, quite simply, to its non-existence.

That Hardwicke did not hold up preparations for site plan approval, at all, is clear from the record. The President of Hardwicke testified that he authorized the obtaining of site plan approval for the theme or entertainment park without regard to 10C (T 1/31/77, p. 39). Mr. Ney, the engineer employed to obtain that approval, testified that his firm was retained in July 1973 to do so (before the 10-C issue arose), and that he needed three months to complete the plans and other submissions which would be required by the Planning Board. Given the date of retention, the filing and completion could not have been accomplished earlier. As Mr. Ney said: "Work proceeded from the day we were first engaged towards a complete site plan application . . . I believe it's the 5th or 6th of November, I submitted the plans to the Township Engineer." (T2/2/77, pp. 19-24). Thereafter, final approval did not occur, after separate litigation finding defects in the submission, until December 26, six days *after* Judge Addison rendered his opinion in the 10C case. Until site plan approval, neither final plans nor construction could have proceeded.

Appendix A

These egregious errors of fact in respondents' submission further demonstrate the prejudice suffered by petitioners, aggravated by the failure of the lower courts to make findings required by the Rules. R. 1:7-4. At this late stage such error cannot be excused.

B.

MALICIOUS INTERFERENCE

Release and Single Controversy

Hardwicke asserts, again unaccompanied by citation to the record, that the release given by it to Stanley and Wanda Switlik could not have simultaneously released Richard from alleged tort liability for interference, and that the single controversy bar, resulting from the dismissal of the specific performance and delay suit, and its settlement on closing, does not apply because Hardwicke was unaware of the interference at the time.

That is, on its face, incredible. Nearly all of the claimed interference made the subject of judgment for

liability and damages related to direct negotiations of clauses *leading to* and predating the closing and settlement. We can only assume confusion in respondents' brief on these issues but, again, that is no excuse, particularly when the facts of record are so clear.

III.

Petitioners' brief in support of reconsideration sets forth numerous grounds for granting certification, each of which fully satisfies the requirements of *R.* 2:12-4. Naturally, we expected respondents to have a different view. What we did not expect—and what we cannot tolerate—is respondents' attempted refutation of petitioners' positions through the use of distortion, deliberate or otherwise. Respondents have chosen not to attack the *validity* of the facts stated by petitioners in their brief on reconsideration. Consequeutly, those facts stand undisputed.

It is not surprising that Hardwicke so fervently wishes to discourage this Court from closely scrutinizing the within matter. For what Hardwicke possesses in the way of an enormous judgment has been obtained by frequent resort to "litigation from ambush," a technique disfavored by the New Jersey Supreme Court from the date of its inception in 1948.

We believe that once this Court examines the undisputed facts in this case, and recognizes the significant legal issues involved, it will correctly conclude that cer-

tification should be granted. If ever a case of importance cried out for final appellate review, it is this one.

Respectfully submitted,

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for Reconsideration
By: WILLIAM B. MCGUIRE
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On the Brief

WBM/TLA/WJP:jrn